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IN THE

Supreme Court of the United States

October Term, 1952, 1953

No. 928- 27

S. G. OLBERDING, Doing Business as Vess Transfer Company, and CHARLES DARNELL, ... Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC., ... Respondent.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Sureme Court of the United States

October Term, 1952.

No. 683.

S. G. OLBERDING, DOING BUSINESS AS VESS TRANSFER COMPANY, AND CHARLES DARNELL, - - - - - *Petitioners,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, INC., - - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The respondent, Illinois Central Railroad Company, an Illinois corporation, recovered judgment against the petitioners in the District Court of the United States for the Western District of Kentucky, for $37,500.00. This judgment was obtained in an action to recover damages from appellants, residents of Indiana, for negligently operating a motor vehicle on the highways of McCracken County, Kentucky, such

negligence resulting in a heavy tractor loaded on the vehicle striking a bridge of the railroad company, and knocking the bridge and tracks located thereon out of line, thus causing the derailment of one of the railroad company's trains shortly thereafter. Summons was issued by the Clerk of the District Court, in which the action was filed. It was served on the Secretary of State at Frankfort, Kentucky, in accordance with the provisions of Kentucky Revised Statutes 188.020 and 188.030, providing for service on non-resident motorists. The statutes provide, in substance, that a non-resident motorist, who accepts the privilege of using the highways of the State, makes the Secretary of State his agent for service of process, in a civil action for negligence resulting in an accident or collision in this State. The opinion of the United States Court of Appeals, affirming the District Court, was handed down February 12, 1953. It appears on page 60 of the record, and is reported in 201 F. 2d 582.

It appears to us that the sole question presented by petitioners is this:

Did the petitioners, residents of Indiana, by operating a motor vehicle on the highways of the State of Kentucky, waive the venue provisions of Title 28, Sec. 1391 (a), U. S. C. A., and consent to be sued in the District Court by plaintiff, a resident of Illinois, to recover damages growing out of such negligent operation?

ARGUMENT.

I.

A State May Require a Non-resident Motorist to Appoint the Secretary of State Process Agent.

Numerous State statutes provide in substance that the operation by a non-resident of a motor vehicle on the highways of a State is the equivalent of the appointment of a designated State Officer as agent of the non-resident upon whom process may be served. It has been uniformly held that a State may enact such legislation in the exercise of its police power. *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632; *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30. If the non-resident plaintiff in this case had sued the non-resident defendants in a State Court, the defendants could have removed the case to the United States District Court. *Lee* v. *C. & O. Railway Company*, 260 U. S. 653. There seems to be no reason why the plaintiffs should be permitted to sue in a State Court and not in a Federal Court, when the defendants could have removed the case from the State Court to the Federal Court.

II.

There Should Be No Legal Distinction Between the Express Consent of a Non-resident by Appointing the Process Agent and Implied Consent by Using the Highways of the State.

The appointment of a process agent by a non-resident corporation, doing business in the State and the designation of the Secretary of State as the agent of a motorist for service of process are both required by law. The requirements are valid and reasonable, and such appointments are waivers of the venue provisions of 28 *U. S. C. A.* 1391 (a). That section provides as follows:

> "A civil action, wherein jurisdiction is founded only on diversity of citizenship, may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

In the case of *Knott Corporation* v. *Furman*, Fourth Circuit, 163 F. 2d 199, referred to in the opinion of the Court of Appeals, a citizen of Massachusetts sued a Delaware corporation in the District Court for the Eastern District of Virginia, to recover damages for injuries sustained in a fire in a Virginia Hotel operated by the Delaware corporation. The defendant raised the question of venue, which is relied on by the petitioners. We quote from the opinion:

> "There is a distinction between express and implied consent, but this distinction has relation to the origin of the cause of action, not to the effect

on venue. It is reasonable to imply consent to suit and service of process from the doing of business within the state as to causes of action arising out of such business but not as to other causes of action. There is no reason for any distinction between express and implied consent, however, when it comes to the waiver of venue. If the doing of business can be held to furnish the basis of consent with respect to suit in the courts of the state, there is no reason why it should not be equally efficacious with respect to furnishing the basis of consent to suit in the federal courts. If the view be taken that the consent is wholly fictitious, there is no reason why the fiction should not serve as well in the one case as in the other. If the court, 'for purposes of justice', to use the language of Judge Learned Hand in the Smolik case, *supra* (222 Fed. 148, 151), treats the situation as if there had been consent, there is no reason why 'purposes of justice' should not be considered under federal as well as under state statutes. Certainly no purpose of justice is served by permitting a defendant to be sued in the state but not the federal courts in a situation such as this, where the defendant himself unquestionably has the right to remove the case to the federal courts if sued in the state courts."

The question presented has been considered by many Federal Courts, and with the exception of the case relied on by petitioners (Martin v. Fischback Trucking Company, 183 F. 2d 53, First Circuit), all appellate courts have followed *Neirbo* v. *Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165, 60 S. Ct. 153, and *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853. The Court said in the Neirbo case, that it did not subject Federal procedure to the requirements of New York Law, but that the consent of the parties

under State legislation authorized the courts of the United States to take cognizance of the case. In the Neirbo case, the court considered a conflict between the rulings of the Second Circuit in the Neirbo case, and the Tenth Circuit in the case of Oklahoma Packing Company v. Oklahoma Gas and Electric Company, 309 U. S. 4, 60 S. Ct. 215. There would seem to be no occasion to reconsider the question. The Kentucky cases referred to by petitioners, Henry Fisher Packing Company v. Mattox, 262 Ky. 318, 90 S. W. 2d 17, and Kennedy v. Lee, 272 Ky. 237, 13 S. W. 2d 1125, do not appear to us to strengthen petitioners' position. The language quoted from the Lee case to the effect that the non-resident motorist statute is a process statute, could not have the effect contended for, namely, that it does not affect venue. The statute expressly appoints the Secretary of State as agent of the non-resident operator of a motor vehicle to receive the service of summons. The question of venue is a matter of Federal procedure. The venue of actions in the Federal Courts is governed by Federal statutes, and rulings of Kentucky Courts on questions of venue, even if applicable, would not be controlling. *Dan Cohen Realty Company* v. *National Savings & Trust Company*, Eastern District of Kentucky, 36 F. Supp. 536.

No good reason has been given for a distinction between a non-resident's waiver of venue by the appointment of a resident agent, and a non-resident's implied waiver, by doing business in the State, or by operating a motor vehicle upon the highways of the

State. Other rulings of Federal Courts, sustaining the decision of the lower court, are:

Mississippi Publishing Company v. Murphee, 326 U. S. 438, 60 S. Ct. 153;
Jacobson v. Schuman, 105 F. Supp. 483;
Burnett v. Swenson, 95 F. Supp. 524;
Urso v. Scales, 90 F. Supp. 653;
Krueger v. Hider, 48 F. Supp. 708;
Steele v. Dennis, *et al.*, 62 F. Supp. 73;
Andrews, *et al.* v. Joseph Cohen & Sons, *et al.*, 45 F. Supp. 732;
Archambeau v. Emerson, *et al.*, 108 F. Supp. 28,

It appears to us that the question has been clearly settled by the decision of this Court.

Respectfully submitted,

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